Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

INWOOD INTERNATIONAL COMPANY,

Petitioner,

v.

WAL-MART STORES, INC., APOGEE SOFTWARE, LTD., SCOTT MILLER, and GEORGE BROUSSARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *Markman v. Westview Instruments, Inc.* has been properly interpreted as permitting district courts to *declare* as a matter of law what disputed patent claim language means based: (1) solely on facts from *no controversy* sources (so-called *intrinsic evidence*); and (2) even though different from either of the claim interpretations urged, argued and briefed by the respective parties, as in this case, or does the Constitution still limit *jurisdiction* of Article Three courts in patent as well as other disputes to only *decide* based: (1) on facts that have first been introduced under oath and tested the same as all other admissible evidence in the *controversy* at hand; and (2) between the presentations made and briefed by the parties themselves in that particular *case*.

Whether the other side of the appeal issue regarding motions to vacate orders of dismissal resolved in *Digital Equipment Corp. v. Desktop Direct, Inc.* when such motions are *granted* should also be accepted for review and clarified when *denied*.

Whether in an Article Three court repeated *refusals of record* to perform required case-dispositive judicial duties to favor one party over another in collusion with the favored party, *also indicated of record*, (1) constitutes misuse of the judicial resources of the United States for personal, non-judicial purposes, and (2) violates (a) the good behavior provision in Section 1, Article Three of the United States Constitution to terminate a judicial term of office defined as "during good behavior," plus (b) the due process clause of the Fifth Amendment thereof.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Inwood International Co., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner Inwood International Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit as well as the underlying decisions of the United States District Court for the Northern District of Texas and of the United States District Court for the Northern District of Illinois in this case.

OPINIONS BELOW

The opinion of the court of appeals is set forth in Appendix A. The order of the court of appeals in which they deny the motion to dismiss the appeal is set forth in Appendix B. The decision of the Texas district court denying a motion to vacate the order of dismissal, to vacate the *Markman* claim interpretation and for judgment as a matter of law is set forth in Appendix C. The order of dismissal entered by the Texas district court is set forth in Appendix D. The order of the Texas district court refusing to rule on the merits of the summary judgment proceedings is set forth in Appendix E. A transcript of the hearing before the Illinois district court in which it transferred this case on its own motion to the Texas district court is set forth in Appendix F. The order of the Court of Appeals in which they deny the petition for rehearing is set forth in Appendix G.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. A) was entered November 17, 2000. A petition for rehearing was denied on December 13, 2000 (App. G). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in relevant part:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, * * * .

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, * * * .

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty or property without due process of law * * *.

Title 35 of the United States Code, entitled Patents, Section 271 provides in relevant part:

> (a) Except as otherwise provided in this title, whoever without authority 1 makes, uses or sells any patented invention, within the United States during the term of the patent therefore, infringes the patent.

Title 35 of the United States Code, entitled Patents, Section 281 provides in relevant part:

> A patentee shall have remedy by civil action for infringement of a patent.

STATEMENT OF THE CASE

The petitioner Inwood International Company ("Inwood") filed this patent infringement suit against defendants under Title 35, United States Code, Sections 271 and 281, on August 20, 1997, in the United States District Court for the Northern District of Illinois (Chicago), alleging infringement of United States Patent No. 4,662,635 (the '635 Patent) covering a video game.

A partial summary judgment proceeding regarding the issue of infringement was ripe for decision in July, 1998, in which undisputed evidence was submitted, even by defendants' own witnesses, from which a court could find that defendants did infringe the claim language in question, and did so willfully. A[1] 78, 79. The Illinois district court

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1. "A" refers to the Joint Appendix filed in the Court of Appeals.

refused to decide the summary judgment motion but transferred the case to the United States District Court for the Northern District of Texas (Dallas) on its own motion.[2]

Two individual defendants are residents of Texas, but none of the defendants had asked the Illinois court to transfer the case, unless it was done by *ex parte* communication without the knowledge of Inwood. The Illinois court had just granted a protective order against those Texas defendants to prohibit their further unlawful activity committed against Inwood and its attorneys in Illinois, so it knew it had jurisdiction over the defendants. The question arises why a court having jurisdiction would transfer a case without ruling on a dispositive motion then ripe for decision, that had been extensively prepared while in that court and could have ended the case at that time, if it hadn't been persuaded to do so by *ex parte* inducement of some kind?

The question also arises, how could the Illinois district court have known someone wanted Texas to be the transfer state, since the defendants are not all from Texas, except by an improper *ex parte* contact and inducement of some kind? No such request to transfer to Texas was ever made of record, nor to the knowledge of Inwood.

The Texas district court also refused to rule on the merits of the summary judgment motion on its own without any request by defendants unless it was done by *ex parte* communications without the knowledge of Inwood. In its order refusing to rule on the merits, the district court said "in fairness to them [defendants]." A18, 19. The question arises as to why a court would say that, unless an improper *ex parte* contact had in fact been made by defendants without the knowledge of Inwood, representing that a ruling on the merits of that motion in which the evidence favors Inwood would be unfair to the defendants?

The case was then referred to a special master for determination of the same claim language defendants had

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2. App. F.

questioned in the summary judgment proceedings, which gave defendants "a second bite at the same apple" so to speak. The order of reference required the special master to submit a first report in accordance with Rule 53(e)(5) of the Federal Rules of Civil Procedure,[3] to give the parties an opportunity to respond thereto, and to then submit his final second report. A182,183. He submitted a first report A186-206, but has never prepared nor submitted the required second report.

Inwood filed a motion and supporting brief to reconsider, clarify and amend the first report. A207-241. The special master did not respond thereto. The district court refused to rule at all on Inwood's motion. It instructed the clerk to "close the motion," saying it would merely stand as Inwood's objections to the special master's report. A245. The district court prevented Inwood's attempt A600-601 and A602-603, to then take the deposition of the special master as an alternate way of communicating with him regarding the basis for his initial claim interpretation report. A351,352. His initial claim interpretation was substantially different than that proposed by either Inwood or the defendants. A236. He drafted an exclusion clause that would be broad enough to exclude defendants' video games from infringement. A345. However, (1) there is no evidence to support the special master's exclusion clause, and (2) the exclusion clause by its terms actually excludes the first *inclusionary portion* of the claim interpretation and the *patented invention itself*. A205,206 and A269. It is contradictory on its face, excluding what it says is included, so it has no meaning at all. Yet the district court refused all of Inwood's attempts to require clarification or correction, even though the order of reference requires the special master to submit a second corrected claim interpretation report after considering the parties comments to the first draft, A182,183, which he has never done.

During a mediation session, defendants offered Inwood a "just walk away" settlement proposal A649, which it accepted

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3. 28 U.S.C. § 53(e)(5).

for no consideration A393, A451,452 and A641 except its understanding that it would have no force or effect if and when the special master's initial claim interpretation could be proven in a different forum willing to hear the evidence that it was based on a mistake of fact and was therefore incorrect. A451,452. Defendants refused to include such reason or consideration in the formal agreements that were to be prepared and signed by the parties. A368,369. Defendants nevertheless asked the district court to enforce the settlement agreement, A353,354, without including Inwood's only reason or consideration for accepting their "just walk away" proposal. Inwood informed the district court accordingly, A391, 392, 393, and gave the district court one more opportunity to correct the mistake of fact. Inwood offered to call prominent identified members of the video game industry as adverse witnesses to prove the mistake of fact based on previous public statements they had made, even outlining for the court the specific information each of the identified witnesses would testify to. A386, 387, 388, 390, 391.

In response, the district court expressly prohibited Inwood by court order from calling such adverse witnesses or from making any further attempt to correct the mistake of fact and the *Markman* claim interpretation based thereon. A398, 399. It also ordered that during the hearing on defendants' motion to enforce the settlement no one could be compelled to waive the confidentiality of any statements made during the mediation where defendants made their "just walk away" proposal. A399. That order effectively prevented any testimony regarding the various oral provisions made and accepted during the mediation conference not specifically identified in the brief outline summary signed and initialed during the mediation conference. Those additional provisions were be included in the fleshed out formal settlement documents the brief outline summary called for, A654, 655, which were to then be executed by the parties themselves and not merely by the attorneys.

After a hearing held July 9, 1999, the district court decided to enforce the preliminary settlement agreement even though the parties themselves had not agreed on the formal settlement documents and defendants would not agree to include Inwood's only reason or consideration for accepting their "just walk away" proposal. A479-483. Defendants hired and paid two attorney witnesses who had no personal knowledge of the facts to give material testimony during the hearing that Inwood believes was knowingly false. A419, 420, 421 and A439, 440. The district court allowed such testimony over Inwood's objection. A421 and A440. Among other things they testified that the preliminary mediation agreement was not ambiguous although there clearly are ambiguities, A4223, 424, A444, 445, that there was consideration to Inwood when they had no personal knowledge one way or the other, A439, and sworn testimony by Inwood's president says there was no consideration. A451. The trial transcript of that hearing has been referred to the United States Attorney for the Northern District of Texas to review for possible perjury, subornation of perjury, witness tampering, and possible complicity of the court itself.

The district court itself dictated provisions the parties had to include in the formal settlement agreements, A484, and set a deadline date of August 24, 1999 for them to agree and sign. A492-494.

The district court also ordered the parties to agree to a draft order of dismissal based on the court dictated settlement agreement they were ordered to agree to and sign. Defendants had not signed the formal settlement agreements with the court dictated provisions by the court ordered date of August 24, 1999, nor by August 27, 1999 when the order of dismissal was entered, nor by September 17, 1999 when Inwood filed its motion to vacate the dismissal order for that reason, among others, nor have they ever lawfully signed any such document. No settlement agreement has ever been finally consummated by the parties themselves. The order of dismissal entered August 27, 1999 is based on a non-existent settlement agreement.

The attorneys for each party were required by court order to agree to, prepare and sign a form order of dismissal. A494. Inwood was allowed to reserve all rights on the face of the dismissal order itself. A496. The order of dismissal is a combined document which first grants defendants' motion to enforce the supposed settlement agreement, and in the second part orders dismissal of some claims with prejudice as well as some claims without prejudice. A495-496.

Inwood subsequently exercised one of its reserved rights when it filed its motion to vacate the dismissal order, to vacate the *Markman* claim interpretation and for judgment as a matter of law. A497-510. The district court denied that motion by an order entered September 17, 1999, A1, without requiring defendants to explain why the documents it had ordered them to sign had not been signed as brought to the court's attention by Inwood. A502. No objection was filed by defendants in response to the allegations made by Inwood in support of its motion for judgment as a matter of law on the issue of infringement, nor to vacate the *Markman* claim interpretation, nor to vacate the order of dismissal. Inwood filed its appeal on October 5, 1999, from the district court's order dated September 17, 1999 denying Inwood's motion.[4]

Defendants filed a motion to dismiss the appeal.[5] The Court of Appeals for the Federal Circuit denied the motion to dismiss the appeal, but said it could only be considered as appeal of a denied Rule 60(b) motion since filed more than ten days after the August 27, 1999 date on which the district court entered the order of dismissal that Inwood contends is not a final appealable order.[6]

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4. Appellant's Response to Motion to Dismiss, Page 6, filed in the Court of Appeals.

5. Appellee's Motion to Dismiss, filed in the Court of Appeals

6. Pages 2, 3 of Order Denying Dismissal of Appeal, of record in the Court of Appeals.

In an attempt to show that at least one of the court ordered settlement documents had been signed by defendants, they submitted a photocopy of a document wherein signature page two with space for signature by defendant Wal-Mart is seen to have been prepared on a different word processor than pages one and three to which it has been stapled.[7] Defendants have never been able to produce an originally signed copy of such document. Inwood asked the appellate court to investigate to determine if the photocopy was genuine, or a false document for the purpose of perpetrating a fraud on the court to the prejudice of Inwood.[8] The appellate court refused to do so. Had that photocopy document been investigated, found to be fraudulent, and expunged from the record, it would have been clear to the reviewing court that *none* of the documents had been agreed to nor signed which the court had ordered the parties to agree to and sign and on which the challenged order of dismissal was supposed to be based.

The Court of Appeals for the Federal Circuit subsequently also refused to review those parts of Inwood's motion asking: (1) for judgment as a matter of law; and (2) to set aside the challenged *Markman* claim interpretation. It then affirmed the district court's denial of that part of Inwood's motion to vacate the order of dismissal entered August 27, 1999, holding its denial was not an abuse of discretion in the appellate court's opinion.[9] It held that Inwood's definition of abuse of discretion in the Fifth Circuit, in which the district court in this case is located, is not correct.[10] The cases cited by the Court of Appeals for the Federal Circuit do not support that holding.[11]

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7. Exhibit to Appellees' Reply to Support Their Motion to Dismiss.

8. Pages 2,3 of Appellant's Response to Appellee's Motion to Strike (of record below).

9. Pages 12, 13 Opinion of Court of Appeals.

10. Page 6, Footnote 2 Opinion of Court of Appeals.

11. *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987); *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977); *Godwin v. Fed. Sav. & Loan Ins. Corp.*, 806 F.2d 1290, 11293 (5th Cir. 1987).

Inwood did cite a number of cases from the Fifth Circuit in its appeal briefs that confirm its definition of abuse of discretion is correct.[12] That is the definition by which Inwood measured each of the fifteen some abuses of discretion by the district court and special master set forth in its appeal brief, all of which were uniformly in favor of defendants and uniformly against Inwood. From experience, it is unusual to have more than one abuse of discretion issue in a single case, and then it is usually inadvertent or the result of a momentary lapse. Fifteen or more by the court in one case, all in favor of the same party and against the other, tends to indicate intent rather than inadvertence, and leads toward a presumption of collusion as well as judicial misconduct.

REASONS FOR GRANTING THE WRIT

This is primarily a collusion and judicial misconduct case, and Inwood has referred it to the Judicial Conference of the United States with transcripts of the record for their consideration. Its primary, or perhaps only significance for review by this Court, is whether Inwood as the injured party should be entitled to recovery of its own damages for infringement of its patent wrongfully denied by such collusion and misconduct, and perhaps an opportunity to itself try the collusion issue before a different district court for possible punitive damages to deter other parties from attempting such conduct in the future. Parties themselves are at the core of

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12. *Thomas v. Texas Dep't of Criminal Justice*, __ F.3d __ (5th Cir.), No. 99-20124, July 25, 2000, citing *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916-917 (5th Cir. 1996); *United States v. Sage Pharmaceuticals*, 210 F.3d 475, 477 (5th Cir. 2000); *Nguyen v. Excel Corp.*, 197 F.3d 200, 211 (5th Cir. 1999); *Next Level Communications LP v. DSC Comm.*, 179 F.3d 244, 247 (5th Cir. 1999); *Cargill, Inc. v. United States*, 173 F.3d 323, 341 (5th Cir. 1999); *Alcatel USA Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999); *Peaches Entertainment Corp. v. Entertainment Repertoire Assoc.*, 62 F.3d 690, 693 (5th Cir. 1995).

corruption. Judges do not play favorites without some inducement. Lawyers do not act without instructions. It is party litigants themselves, particularly those having extensive wealth, power and influence, who are the ultimate cause of political as well as judicial corruption, if and when it exists. There are fairly effective disciplinary measures to deter misconduct on the part of lawyers and judges, but there is none for parties themselves except for the somewhat remote possibility of punitive damages. This case presents an opportunity for the Court to address that issue, trial of which Inwood is willing to undertake if remanded or transferred to an appropriate district court for that purpose with appropriate orders requiring all persons to cooperate fully regarding discovery and giving of evidence, without claim of privilege or immunity.

The errors of law are otherwise pretty much garden variety in this case. Such things as refusing to rule on the merits of motions, and refusing to hear evidence to correct mistakes of fact, are so obviously wrong that even those who have done those things know they are wrong without further review of those issues by this Court except for denial of due process.

I.

TWO QUESTIONS UNIQUE TO PATENT INFRINGEMENT CASES

Two questions unique to patent infringement cases raised by the facts of this case should be examined by this Court. One is the practice of making so-called *Markman* claim interpretations as a matter of law *before* all of the evidence has been presented in open court, under oath, subject to cross examination and the other safeguards of open court trial practice. The second is allowing or perhaps even encouraging district courts and special masters in patent infringement cases to in effect *declare* what patent claim language means as a matter of law, *even though that may be different from what either of the parties themselves had urged, argued and briefed, as happened in this case.* The objective of the Court of Appeals for the Federal

Circuit appears to be a sort of uniform "holy grail" type of claim interpretation that will be cast in stone for all cases for all time.

Both of these practices appear to violate Article Three of the United States Constitution as well as the due process clause of the Fifth Amendment thereof, and the jury trial provision of the Seventh Amendment where a jury trial has been requested. Dictatorial declarations of what is right for all time and all purposes have one thing in common, they are almost always proven to be wrong with the passage of time. Often a very short period of time. The question is, do the courts in our system, particularly Article Three courts under the Constitution of the United States, have the authority or jurisdiction to *declare* what the law is including for cases not then before them, or do they only have authority and jurisdiction to *decide* which one is right as between the different interpretations of law and fact urged, argued and briefed by the particular parties in each particular case then before the court?

II.

CONFLICT WITH OTHER CIRCUITS

There appears to be a conflict on this issue that this Court should resolve. Unless there is an actual controversy, there is no subject matter jurisdiction.[13] A special statute is needed to bring a declaratory judgment action,[14] for Article Three courts to have any jurisdiction at all to *declare* what the law is. They can only do so even then in cases that are specifically identified and qualify as declaratory judgment actions. The Court of Appeals for the Federal Circuit appears to hold that Article Three courts may *declare* what the law is in non-declaratory judgment actions, particularly with respect to patent claim interpretations.[15] And those claim interpretations are

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13. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1936).

14. Title 28, United States Code, § 2201.

15. *Markman v. Westview Instruments*, 52 F.3d 967, 973, 34 USPQ2d 1321, 1337 (CA Fed. 1995).

usually dispositive. The concurring opinion of the Court of Appeals itself acknowledges in its *Markman* decision identified in footnote 15, *supra*, that, "* * * to decide what the claims mean is nearly always to decide the case." The court also recognizes in its concurring opinion that this does create a conflict with all other Circuits in all of the other areas of the law, where it says on page 1337 of 34 U.S.P.Q.2d,

> Today the court jettisons more than two hundred years of jurisprudence and eviscerates the role of the jury preserved by the Seventh Amendment of the Constitution of the United States; it marks a sea change in the course of patent law that is nothing short of bizarre. Sadly, this decision represents a cessation from the mainstream.

The Federal Circuit now holds that Article Three courts may declare what a patent claim means as a matter of law based on so-called *intrinsic evidence or facts* taken from a previous "no controversy" patent and "no controversy" patent prosecution case to the exclusion of witnesses in the case at hand.[16] The Federal Circuit now holds since the *Vitronics* case cited in the footnote below that Article Three courts may do so in preference to evidence given by witnesses in open court who are under oath, subject to cross-examination, and the other truth determining requirements of open court trial practice.

All other Circuits hold that Article Three courts may only *decide* what the law is based on the facts determined in each particular case and fact situation. Furthermore, Article Three courts in all other Circuits can only choose or *decide* as between the different interpretations urged, argued and briefed by the parties to each particular litigation. That even applies where other-than-patent types of *intrinsic evidence* is involved, which has to itself meet the tests and requirements of open court trial

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16. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 39 USPQ2d 1573, 1579 (Fed. Cir. 1996).

practice the same as any other relevant evidence.[17] The only exception in the other Circuits is for patent matters, which are not appealable to their own respective Courts of Appeals in any event, but to the Court of Appeals for the Federal Circuit.

The Constitution appears to limit the jurisdiction and authority of Article Three courts to only *decide* on the basis of the particular facts in the controversy before it which have undergone the tests and safeguards of open court trial practice, not to *declare* what the law is based on "no controversy" evidence from a previous non-trial source that is intended to be dispositive of all future cases, including the one at hand.[18] This Court should resolve such conflict, not only between the Circuits but also and perhaps more importantly whether the Constitution sanctions one rule of law for one select subject matter and a different uniform rule of law for all others. Or does the Constitution require that a uniform rule of law be applied equally to all, patent matters included?

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17. *United States v. Gilbert*, 229 F.3d 15 (CA1, 2000); *Securities Industry Ass'n v. Fed. Reserve Sys.*, 839 F.2d 47 (CA2, 1988); *Brown & Williamson Tobacco v. Food & Drug*, 153 F.3d 155 (CA4, 1998); *United States v. Taylor*, 210 F.3d 311 (CA5, 2000); *United States v. Czuprynski*, 46 F.3d 560 (CA6, 1995); *Unelko Corp. v. Prestone*, 116 F.3d 237 (CA7, 1997); *McClure v. American Family*, 223 F.3d 845 (CA8, 2000); *United States v. Green*, 175 F.3d 822 (CA10, 1999); *United States v. Schlei*, 122 F.3d 944 (CA11, 1997); *United States v. Crowder*, 141 F.3d 1202 (CADC, 1998). No "other-than-patent *intrinsic evidence*" cases found in the Sixth and Ninth Circuits, nor any other exception in any Circuit.

18. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1936); *Ashwander v. Valley Authority*, 297 U.S. 228, 325 (1936); *Nashville, Chattanooga & St. Louis Railway Co. v. Wallace*, 288 U.S. 249, 256 (1933); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 75 (1927); *Muskrat v. United States*, 219 U.S. 346, 357-359 (1911).

III.
MUST DETERMINE FACTS IN ACTUAL CASE OR CONTROVERSY

The question the Court is being asked to review is separate and apart from whether a jury or the court should decide. This Court has already decided that it is up to the court to determine what a patent claim means as a matter of law.[19] However, that has to be done based on facts, and facts on which the Court can be as sure as possible that they are true. The question presented in this petition is whether those facts should:

(1) be determined in an actual *controversy*, tested by the crucible of open court trial practice, given in open court by witnesses under oath, subject to cross-examination, and subject to all of the federal rules of evidence as applied in and to the particular case at hand; or

(2) taken from a previous "*no controversy*" source such as a patent or other printed document, or a "no controversy" patent prosecution proceeding in which none of the facts have been determined under oath, except in the few cases where affidavits are occasionally submitted, none of the evidence subjected to cross examination or the other tests of open court trial practice, many of the remarks are not given as evidence at all even in the patent prosecution proceeding itself but are merely argument, and other deficiencies too numerous to itemize here.

Even in *cases or controversies* tried to the court *without* a jury, the same open court trial practice tests normally used in cases or controversies tried to a jury, should first be used to winnow out the true facts of the particular case at hand before then making the claim interpretation as a matter of law. That should mean also subjecting any facts thought relevant to the particular case at hand, whether from the patent itself, from the patent prosecution case, or wherever else, to the open court trial tests such as given under oath in the case at hand, subject to

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19. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

cross examination as well as to objections of relevance, competence, and subject to all of the normally applicable federal rules of evidence and procedure. That will not only meet the Constitutional requirements of "case or controversy," but will result in better quality of evidence and justice itself. The argument for a declared patent claim interpretation not dependent on the particular facts of any given case but applicable to all cases in "holy grail" fashion, so everyone can know in advance of litigation what is covered and not covered, is illusory.

IV.

MIXED QUESTION OF FACT AND LAW

Many of the patent claim language disputes are not really matters of law at all, but matters of fact. For example, whether the word "animals" includes whales is a matter of fact. If someone says under oath they are fish and the word "animals" does not include whales, believing that to be true, that is not perjury. Many people do believe that. But trial practice permits admission of truthful evidence to show the witness his statement is not true, that whales really are animals. If he nevertheless still testifies the word "animals" does not include whales after he knows it does and that his statement is false, that is perjury. There are instances too numerous to mention wherein people, including judges themselves, firmly believe something to be true that in fact is not really true. Without an in-court trial opportunity to confront them with the fact their firmly held belief is not true, wherein they can be compelled to dislodge that firm belief to thereafter testify under oath that they were wrong and the opposite is true, the facts on which a claim interpretation is based are likely to be wrong and the claim interpretation itself as a matter of law is likely to be wrong.

In the present case brought by Inwood, the words in question include a video game having "video recording means for visual reproduction and eventual playback of * * * action events performed by living beings." A62. If a witness under oath says that language does not include *simulations* of action events

performed originally by living beings (as the special master's claim interpretation in this case does) A20-21, believing that to be true, that would not be perjury. But if said under oath during the open court trial phase, where truthful evidence could be admitted to show the witness his statement was not true, that *everything* that is recorded in a video recording means and played back *is a simulation*, A389, as Inwood offered to do by adverse witnesses from the video game industry itself, A389, and the witness thereafter still says under oath that the quoted language does not include simulations of action events performed originally by living beings after he knows it does and after he has full knowledge that his statement is false, that is perjury.

Also in this case, if a person says the language "action events performed by living beings" in a video game excludes simulated actors, such as cartoon characters or fictitious beings, seen performing on the screen, A189, line 3, paragraph 1, believing that to be true, that would not be perjury. But if said under oath during the open court trial phase, where truthful evidence could be admitted to show the witness his statement was not true: (a) that living beings wearing Mickey Mouse or other cartoon character costumes is one example where cartoon characters seen on the screen being moved about by the person inside are within the language "action events performed by living beings;" (b) to show the witness that living beings concealed behind a screen manipulating puppets is an example where fictitious beings seen being moved about on the stage or screen by the unseen puppeteer are within the language "action events performed by living beings;" (c) to show the witness that living beings at the controls of a computer manipulating the ubiquitous arrow or other objects on the screen, such as puppet-like characters seen being moved here and there on the screen by that unseen computer programmer are within the language "action events performed by living beings;" (d) to show the witness that living being actors concealed behind a computer but connected thereto by cables making a character seen on the

screen duplicate every movement made by the unseen actor are within the language "action events performed by living beings," and so on without end, A78-79 and A507, and the witness thereafter still says under oath that the quoted language *does* exclude cartoon characters or fictitious beings that are moved by living beings after he has full knowledge that it *does not* exclude, and with full knowledge such statement is false, that is perjury.

Another example in this case was an attempt by defendants to say that since prior art video games did show non-living objects moved about on the screen to simulate or pretend they were football players or whatever, they are the same as the video game in this case insofar as the non-living, pretend or simulated beings are concerned. If a witness testified to that effect under oath during the open court trial phase believing that to be true, that would not be perjury. However, truthful evidence would then be admissible to show the witness that such prior art video games created the motion of those non-living beings by a completely different kind of video game machine, such as by generating electrical waveforms similar to the sine waves generated by oscilloscopes, whereas the motion of any non-living beings seen on the screen of the patented video game has been created by a totally different mechanism, namely by recording the motion in a video recording means which none of the prior art video games did, and with living beings actually manipulating any non-living beings that are seen moving on the screen, as Inwood also offered to do in this case. A386-391. If the witness in such open court trial setting still testifies under oath after having full knowledge of what the true facts are, that prior art video games having non-living beings moved about on the screen to simulate or pretend they were football players or whatever, are the same as the video game in this case insofar as movement of non-living, pretend or simulated beings are concerned, knowing now that such statement is false, that is perjury.

The disputed language in this case is "video recording means for visual reproduction and eventual playback of a plurality of separable action events performed by living beings which remain as originally recorded when played back." A62 and A205. There is nothing ambiguous about that language that requires interpretation *as a matter of law*. The only dispute anyone can make regarding that language involves *matters of fact* that can and should be determined during open court trial proceedings. Had the statements made by defendants' attorneys, by the special master and by the district court in this case on which the challenged *Markman* claim interpretation is based, been made by witnesses under oath during open court trial proceedings including those statements outlined above with the opportunity to cross examine and confront the witnesses with what the true facts are in each of those cases, they would all have been perjury. Instead of the claim interpretation favorable to defendants that excludes their video games from infringement making them an apparent winner, the witnesses would all be headed for indictment, possible trial and possible prison terms.

This is an example from a real life case in which claim interpretation based on so-called *intrinsic facts* from "no controversy" sources (patent and file history) comes to a conclusion of no infringement, but would be perjury if given in an "actual controversy" open court trial setting whereby a claim interpretation based on true facts would establish the opposite as a matter of law, whereupon defendants' video games do then infringe.

Inwood has reason to believe this happens routinely in the so-called *Markman* claim interpretation proceedings since the *Markman* and *Vitronics* cases were decided in 1996. The disputed claim language almost always involves questions of fact mixed in with questions of law, and many if not most times only questions of fact as in this case. A dispute can be made about the meaning of any language if the opportunity is available. All such disputes require first and foremost truthful

evidence as to the facts. After the trial phase with all truthful evidence on the table, if there is then any ambiguity that is when it becomes the province of the court to interpret as a matter of law.

Claim interpretation is ultimately a matter of law to be determined by the court as this Court has already decided,[20] but only after all of the questions of fact have first been winnowed out. That is the way litigation is conducted in all cases under the Constitutional requirements of our system, except for patents. There is no reason why patent litigation should be conducted differently, and for Article Three courts to do so appears to violate the several provisions of the United States Constitution identified herein above as well as create a conflict with all other Circuits regarding all subject matter other than patents. The Court of Appeals for the Federal Circuit is the only one which does this, and they appear to do so by misinterpreting what this Court held in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). Although this Court held in that case that the court should make patent claim interpretation as a matter of law rather than a jury, it did not hold that the facts on which such determination is made by the court, whether intrinsic, extrinsic or whatever, need not be true, channeled through the crucible of open court trial practice in the particular case at hand the same as any other controversy which Article Three courts have jurisdiction to hear and decide. The facts of this case present the opportunity for this Court to correct that apparent misinterpretation by the Court of Appeals for the Federal Circuit. It is a sobering thought to think that one Circuit may have been making determinations of law based on facts that if put to the required *controversy* test of open court trial practice might have been perjury.[21]

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20. *Ibid*, n.19.

21. Since their decisions in 1996, a search reveals that 263 reported cases have either relied on or cited the *Markman* decision and 77 the *Vitronics* decision in the short time span of four years.

Trial courts who are not familiar with such a unique way of handling this one kind of litigation applicable only to patent disputes, become more receptive to *ex parte* contacts from highly specialized patent counsel. That inevitably invites collusion and ultimately corruption. Even if Constitutional which they do not appear to be, this Court should exercise its supervisory power if necessary to exclude practices that appear to open the door to increased *ex parte* contacts, followed by increased collusion and ultimately increased corruption in our judicial system.

V.

SPECIFIC ERRORS OF COURT BELOW

The specific errors by the Court of Appeals for the Federal Circuit which justify review and reversal by this Court include the following.

(1) It was error to hold that the contract based order of dismissal entered August 27, 1999 by the district court was a final appealable order even though the order states on its face that Inwood reserves all rights. A dismissal order that reserves all rights to one or more of the parties cannot be a final appealable order.[22]

(2) It was error to hold the dismissal order was a final judgment since it does not appear on a separate document[23] from that on which a motion is granted to make a settlement agreement binding.[24]

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22. *Behrens v. Peltier,* 516 U.S. 299, 306 (1996).

23. "This [separate document requirement] represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing, *inter alia* on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal." 6A J. Moore, *Federal Practice*, ¶ 58.04, at 58-161 (1972).

24. *United States v. Indrelunas,* 411 U.S. 216, 215 (1973); *Richland Trust Co. v. Federal Insurance Co.,* 480 F.2d 1212 (CA6, 1973), Summary judgment order, but no separate judgment.

(3) It was error to hold the dismissal order was final for purposes of appeal since it dismisses some claims with prejudice and others without prejudice.[25]

(4) The dismissal order does not otherwise comply with Rules 54[26] and 58[27] of the Federal Rules of Civil Procedure.

(5) It was error to hold that Inwood could only appeal denial of its September 17, 1999 motion under Rule 60(b)[28] based on an "abuse of discretion" standard and not on the merits.[29]

VI.

APPEAL OF ORDER DENYING A MOTION TO VACATE AN ORDER OF DISMISSAL

The district court's denial on September 17, 1999, A1, of Inwood's motion to vacate the order of dismissal, A495-496, entered August 27, 1999, should have been treated as a final order appealable on the merits of the whole case. The court order entered August 11, 1999, A492-494, required the parties to execute the court ordered settlement documents and submit an agreed order of dismissal, A495-496, based on such settlement by August 24, 1999. Under those circumstances, can a district court having an agreed order of dismissal in hand hold it indefinitely for entry at any time without notice to the parties,

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25. *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (CA10, 1992); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 300 (CA5, 1978). Dismissal without prejudice is not a final judgment on the merits making a dismissal order that also dismisses other claims with prejudice, a non-final and non-appealable order.

26. 28 U.S.C. § 54; Multiple claim dismissal order both "with prejudice" and "without prejudice" is not final and appealable without an express determination there is no just reason for delay and upon an express direction for entry of judgment.

27. 28 U.S.C. § 58; "Every judgment shall be set forth on a separate document."

28. 28 U.S.C. § 60(b).

29. Pages 2 and 3 of Appeals Court order denying dismissal dated November 8, 1999.

so the ten day appeal period in Rule 59(b)[30] to move for a new trial and in Rule 59(e)[31] to alter or amend would have expired before the parties even knew the order of dismissal had been entered?.

It would seem that orders of dismissal which are considered judgments only by virtue of the definition in Rule 54(a),[32] stand on a different footing than judgments entered after an actual trial on the merits. In the "order of dismissal" instance, a court so inclined can enter a Rule 54(a) type judgment the parties may have no knowledge of until well after the ten day Rule 59[33] appeal period has expired. In the "judgment after trial on the merits" instance, there is virtually no way a court could keep the parties from knowing the exact date on which the judgment is entered and the ten day appeal period starts.

In the present case, Inwood did not have knowledge that the order of dismissal had been entered until after the ten day appeal period in Rule 59[34] had expired.

Then a second question arises. Can a court so inclined *enter* a previously received Rule 54(a)[35] type dismissal order/ judgment based on a court ordered settlement agreement: (a) *before* it knows whether the parties have in fact signed such settlement documents; (b) *before* the parties have in fact signed; (c) *before* less than all have signed; (d) *before* the parties themselves know whether all of the others have signed?

In the present case, Inwood does not have knowledge even today that defendants have lawfully signed any of the court ordered settlement documents, and is certain that one has not

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30. 28 U.S.C. § 59(b).
31. 28 U.S.C. § 59(e).
32. 28 U.S.C. § 54(a).
33. 28 U.S.C. § 59.
34. 28 U.S.C. § 59.
35. 28 U.S.C. § 54(a).

been signed because it has never even been drafted. That is the one that was supposed to include the specific provisions dictated by the court itself , A484, during the July 9, 1999 hearing. The district court itself had knowledge defendants had not signed at the time Inwood filed its motion to vacate the order of dismissal, since Inwood told the court so in its supporting brief. A502.

Under these circumstances, it seems clear that orders of dismissal that are made judgments only by virtue of the definition in Rule 54(a) should not be treated the same as judgments entered after trial on the merits. There are legitimate circumstances where they should not be treated as final appealable orders at all, such as those outlined above. There are legitimate circumstances where the order *denying* a motion to vacate a dismissal order should be treated as the final appealable order of the case. Since this is such an important matter, and there appears to be considerable confusion, the Court is urged to accept this case for review and clarification of the questions regarding orders *denying* motions to vacate an order of dismissal, taking into consideration that *orders* are only treated as a "judgment" within the scope of Rule 59[36] because of the definition paragraph in Rule 54(a).

Here are questions which need answers. Can court orders *denying* motions to vacate orders of dismissal be the final appealable order of the case from which a regular appeal on the merits may be taken within the normal thirty day period in which to bring a regular appeal? In all cases? Or some cases? Is this case one based on the facts presented, where the district court's order denying the motion to vacate the order of dismissal should be considered the final appealable order in the case, and not the order of dismissal itself?

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36. 28 U.S.C. § 59.

VII.

COMPARE "OPPOSITE SIDE OF THE COIN" ISSUE PREVIOUSLY CLARIFIED

This Court has clarified the "opposite side of the coin" issue in *Digital Equipment Corp. v. Desktop Direct, Inc.*[37] namely where motions to vacate orders of dismissal have been *granted*, and what appeals may be taken, if any, in those "opposite side of the coin" situations referring to the "collateral order doctrine" in *Cohen v. Beneficial Loan Corp.* The Court held in the *Digital Equipment* case that appeals could not be taken in those cases where "motions to vacate orders of dismissal" had been *granted*. An equally clarifying review needs to be made regarding the appeal issue in cases where "motions to vacate orders of dismissal" have been *denied*.

In the present case, the order of dismissal attempts to dismiss a case (a) that has not been tried to a final decision on its merits and (b) in which there is no meeting of the minds by the parties themselves regarding terms of a settlement agreement and thus no agreement to settle or dismiss. There is no contract if there is no meeting of the minds.[38] The court itself cannot compel the parties to agree to a contract drafted or dictated by the court itself.[39]

The district court's order of dismissal would, if valid, forever protect defendants from liability for infringement of the '635 Patent. Based on evidence given under oath in this case even from defendants' own witnesses, A78-79, a court could find that defendants did in fact infringe Inwood's patent, and did so willfully with knowledge of the patent and that its video games do infringe. Both the Illinois district court and Texas district court had earlier refused to rule on that part of the case

37. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 5 U.S. 863 (1994). *See also Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

38. *Ozyagcilar v. Davis*, 701 F.2d 306, 308 (CA4, 1983). *See also Callie v. Near*, 829 F.2d 888, 890 (CA9, 1987).

39. *Wang Laboratories Inc. v. Applied Computer Sciences Inc.*, 958 F.2d 355, 359 (CA Fed. 1992).

then ripe for decision under circumstances that indicate *ex parte* contact with the court and collusion as outlined in detail herein above. The district court had full knowledge of such evidence of infringement, plus additional confirming evidence offered and outlined by Inwood to be given by prominent adverse witnesses from the video game industry itself which the district court had prevented Inwood from introducing in this case. A387-391 and A398-399.

Should there be any other issues yet to be resolved, the testimony of defendants' paid witnesses at the hearing terminated that. Their witnesses' paid testimony regarding the expansive scope of mutual releases they said were applicable to both sides as to all patent issues: (a) that were encompassed; or (b) that could have been encompassed, in this lawsuit, A422-424 and A441-445, would prevent their principals [defendants] from thereafter raising any claims or defenses whatever regarding the '635 Patent by virtue of estoppel, waiver, or other similar bar. That would be true under the law relating to estoppel, waiver and similar bars, even though the challenged settlement agreement could hardly have any force and effect as to Inwood under the facts of record in this case.

The case before the Court is even now ripe for decision that defendants' video games do infringe the '635 Patent and that defendants infringement has been willful, with knowledge of the patent and that their video games do infringe based on sworn testimony of their own witnesses. Defendants did not contest the facts on which Inwood's motion for judgment as a matter of law was based, and in fact did not even file a response thereto. This Court can itself decide the issue of liability for willful infringement here, including the fact that it is an exceptional case based on the facts set forth, and remand to the district court for determination of damages only, including treble damages[40] and attorneys fees[41] as provided by the patent statutes.

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40. 35 U.S.C. § 284.

41. 35 U.S.C. § 285.

The record shows that defendants own witnesses confirmed their video games do infringe when put under oath and questioned by opposing counsel. The district court not only refused to rule on the merits of that summary judgment proceeding, but with a then appointed special master seemed determined to come up with a claim interpretation that would nullify the previous testimony under oath that the video games do infringe. When it became apparent Inwood could show the first draft claim report was not correct, they refused to let such evidence into the case. They have also refused to prepare or submit the second claim interpretation report which the court's own order of reference to the special master requires. In short, when they saw a corrected report would confirm the sworn testimony of infringement, they simply did not submit the second required report. The assignment of claim interpretation given to the special master hasn't been completed, but just allowed to hang there in limbo. Finally, the bizarre hearing and enforcement proceedings to impose a settlement and dismissal the court knew Inwood had never agreed with, based on objected to testimony from non-party witnesses hired by defendants to give pre-arranged testimony Inwood believes is knowingly false, about reaches the limit. The court seems to have had a vested interest in doing whatever necessary to see that Inwood did not win this case.

There are not many reported cases in which other courts have so flagrantly favored one party over the other. One similar case Inwood was able to find is *Rossi v. Colorado Co.*,[42] in which the Colorado Supreme Court held that an August 23, 1927 arrangement by bondholders to which the general creditors had not agreed was void on its face, and the corresponding order of the district court under that date was also void. The district court's order of dismissal in this case is similarly void. A district court's order denying a motion to vacate a void dismissal order is one that should be treated as a final appealable order in and of itself.

42. *Rossi v. Colorado Pulp and Paper Company, et al.*, 88 Colo. 461, 497 (Colo. 1931), 299 P. 19.

The Court of Appeals refusal to review the district court's denial of Inwood's motion for judgment as a matter of law, and its denial of Inwood's motion to vacate the uncorrected *Markman* claim interpretation report for which the special master and court both refused to submit the second corrected report required by the order of reference itself, was clear error which this Court should itself review and decide on the merits. The Court of Appeals affirmance of the district court's denial of Inwood's motion to vacate the order of dismissal should be reversed.

VIII.
WHETHER "DURING GOOD BEHAVIOR" LIMITS JUDICIAL TERM OF OFFICE

One final question is presented by the facts of this case. Can judicial misconduct to favor one litigant over another in a particular case reach the point it violates the good behavior requirement of Section 1 of Article Three of the United States Constitution to end a term of office defined as "during good behavior?" Is the Constitutional requirement of good behavior which defines how a term of office *shall be ended*, separate and apart from impeachment which defines how a person *shall be removed* from that office?

Attorneys do have an affirmative duty to call misconduct to the attention of authorities,[43] but it is then the sole responsibility of the Court and its designated agencies. As for any role by defendants themselves in such misconduct, if the Court is willing to remand this case to an appropriate district court for trial of that issue and possible punitive damages as a deterrent to others, over and above whaever damages are recovered in the underlying patent infringement case, Inwood is willing to undertake that litigation. It is willing to do so if everyone involved is required by this Court to cooperate in discovery and trial without claim of privilege or immunity.

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43. *In re Himmel*, 125 Ill.2d 531 (1988), 533 N.E.2d 790.

Statements corroborating what is already of record regarding collusion and other misconduct are available from three separate sources to warrant proceeding if claims of privilege and immunity relating thereto are barred or appropriately restricted. That information has already been given in confidence to the designated officials within the Judicial Conference of the United States for their use as far as the alleged misconduct of the district court and special master are concerned.

When people begin to feel that the consequences for collusion and judicial misconduct aren't likely to happen to them, they have little effect. Parties themselves, as well as judges and lawyers need to know that the consequences for collusion and misconduct are both serious and certain.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED NOVEMBER 17, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1024

INWOOD INTERNATIONAL CO.,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC., APOGEE SOFTWARE, LTD., SCOTT MILLER, and GEORGE BROUSSARD,

Defendants-Appellees.

DECIDED: November 17, 2000.

Before RADER, SCHALL, and LINN, *Circuit Judges*.

LINN, *Circuit Judge*.

Inwood International Co. ("Inwood") seeks review of the decision of the United States District Court for the Northern District of Texas ("the district court") denying its Rule 60(b) motion to vacate the dismissal of its claims against Wal-Mart Stores, Inc., Apogee Software, Ltd., Scott Miller, and George Broussard (collectively "Wal-Mart"). *See Inwood Int'l Co. v. Wal-Mart Stores, Inc.*, No. 3:98-CV-1846-D

(N.D. Tex. Sept. 17, 1999); *see also Inwood Int'l Co. v. Wal-Mart Stores, Inc.*, No. 00-1024, slip op. at 2 (Fed. Cir. Nov. 8, 1999) (Order). Because we discern no abuse of discretion by the district court in dismissing Inwood's Rule 60(b) motion, we *affirm*.

BACKGROUND

On August 20, 1997, Inwood sued Wal-Mart for infringement of its U.S. Patent No. 4,662,635, (the " '635 patent") entitled "Video Game with Playback of Live Events." In a mediation session held on March 19, 1999, the parties drafted and signed a two-page settlement agreement ("Settlement Agreement") to resolve the infringement suit. The Settlement Agreement states in pertinent part:

> The following constitutes a settlement agreement between the parties . . . in Civil Action No. 3:98CV1846.
>
> 1. Inwood grants to [Wal-Mart] and Action Entertainment a perpetual, royalty-free license to make, use, sell and offer for sale games covered by . . . the '635 patent.
>
> 2. Inwood grants to Wal-Mart [Stores, Inc.] a perpetual royalty-free covenant not to sue for selling or offering to sell games covered by the '635 patent, and using such games in the context of [their] efforts to sell the games. Inwood also promises not to sue [Wal-Mart Stores, Inc.'s] customers for using games covered by the

'635 patent, which were purchased from [Wal-Mart Stores, Inc.], but does not release the fact that such use may be an infringement of the '635 patent.

3. Each party agrees to execute mutual releases.

4. Inwood shall dismiss its claims against Apogee, Miller, and Broussard with prejudice.

5. Inwood shall dismiss, with prejudice, its claims against Wal-Mart [Stores, Inc.] that relate to Apogee's games.

6. Inwood shall dismiss, without prejudice, its claims against Wal-Mart [Stores, Inc.] that do not relate to Apogee's games.

7. Each party shall bear its own costs, expenses, and attorneys' fees. . . .

9. The parties shall execute formal settlement documents in accordance with the terms of this agreement. . . .

On July 9, 1999, the district court held an evidentiary hearing principally to address Wal-Mart's motion to enforce the Settlement Agreement. At the conclusion of the hearing, the district court found that the Settlement Agreement contained sufficient essential terms to be enforceable and that it was unambiguous in setting forth the terms on which the parties would settle. The court also found that the

obligations of the parties to execute mutual releases and to execute formal settlement documents set forth in the Settlement Agreement were simply mutual obligations to execute documents that reflect what is set forth in the two-page agreement. In addition, the district court noted that there were no subsequent agreements reached by the parties, and thus, the two-page March 19, 1999 agreement was the only enforceable Settlement Agreement regarding the infringement suit.[1] In view of the foregoing, the district court directed the parties to submit an agreed order of dismissal of the infringement suit in accordance with the terms of the Settlement Agreement and noted that the parties had an obligation to execute mutual releases and formal settlement documents incorporating the specific terms set forth in the Settlement Agreement.

After this hearing, the parties corresponded with each other to arrive at agreed upon releases and formal documents. However, disputes arose concerning the language of both. In particular, Inwood contended that the mutual releases should not include the release of the parties' agents, shareholders, attorneys, assigns, and successors-in-interest. The district court resolved these disputes in an August 10, 1999 order. In that order the district court concluded that the Settlement Agreement contemplated that the releases would be full releases, and, as such, it was proper for the mutual release to include the obligation to release the parties

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1. The district court specifically noted that the formal documentation and counter documentation by the parties prepared after the signing of the Settlement Agreement were merely offers, declined offers, and counteroffers.

and their attorneys. Moreover, the district court ordered the parties to execute the mutual releases and submit the dismissal order to the court no later than August 24, 1999.

On August 24, 1999, pursuant to the district court's August 10, 1999 order, the parties finally submitted an agreed order of dismissal to the court. Consequently, the district court entered judgment dismissing all of Inwood's claims against Wal-Mart on August 27, 1999. On September 17, 1999, Inwood filed a motion requesting not only that the district court vacate its August 27 dismissal order, but also requesting that the court vacate its patent claim construction, and rule as a matter of law that Wal-Mart infringes its patent. The district court denied Inwood's motion on September 20, 1999. Inwood filed a notice of appeal in this court on October 5, 1999.

Wal-Mart moved to dismiss Inwood's appeal to this court as untimely because it was filed well after thirty days from the district court's August 27, 1999 final judgment and because Inwood's September 17, 1999 motion to the district court did not toll the time for filing an appeal of that final judgment in this court. In our Order, we denied Wal-Mart's motion. *See Inwood*, No. 00-1024, slip op. at 1. We determined that Inwood's September 17, 1999 motion could be treated as a motion for relief from judgment under Fed. R. Civ. P. 60(b); and, as such, Inwood's October 5, 1999 appeal was timely filed within thirty days of the district court's September 20, 1999 denial of that 60(b) motion. *Id.*

We have jurisdiction of this appeal under 28 U.S.C. § 1295(a)(1) (1994).

Appendix A

DISCUSSION

A. Standard of Review

Rules 60(b)(1) and 60(b)(6) allow a district court to relieve a party from a final judgment for: (1) mistake, inadvertence, surprise, or excusable neglect; or (2) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b)(1) and (6). Because the denial of a Rule 60(b) motion is a purely procedural question not unique to patent law, we review that denial under the law of the regional circuit where appeals from the district court would normally lie, in this case the Fifth Circuit. *See Marquip, Inc. v. Fosber Am., Inc.*, 198 F.3d 1363, 1369 (Fed. Cir. 1999) (citing *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1550 (Fed. Cir. 1987)).

The Fifth Circuit has noted that Rule 60(b) "seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.' " *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (internal citations omitted). Thus, "a Rule 60(b) appeal may not be used as a substitute for the ordinary process of appeal once the appeal period has passed." *In re Ta Chi Navigation (Pan.) Corp. S.A. v. United States*, 728 F.2d 699, 703 (5th Cir. 1984); *see also Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 695 (5th Cir. 1983); *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912 (5th Cir.), *cert. denied*, 459 U.S. 1070 (1982).

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Relief from final judgments premised on Rule 60(b)(6) requires a showing of "extraordinary circumstances." *See Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990). Relief from final judgments premised on "mistake" may be invoked in the Fifth Circuit to rectify an obvious error of law apparent on the record, such as when the judgment obviously conflicts with a clear statutory mandate or when the judgment involves a fundamental misconception of the law. *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987). But, even assuming that the district court made an error of law, it has the discretion to deny a Rule 60(b) motion where the petitioner has forfeited a proper appeal of the merits, and is by the motion attempting to end-run the normal appellate process for correcting legal error. *See Halicki v. La. Casion Cruises, Inc.*, 151 F.3d 465, 471 (5th Cir. 1987). In other words, even if there was an error of law, the reopening of a judgment is not mandatory. *See Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977).

Consequently, in the Fifth Circuit, "[m]otions under Rule 60(b) are directed to the sound discretion of the district court and [a] denial of relief upon such motion will be set aside on appeal only for abuse of that discretion . . . . It is not enough that the granting of relief might have been permissible, or even warranted — denial must have been so unwarranted as to constitute an abuse of discretion." *Godwin v. Fed. Sav. & Loan Ins. Corp.*, 806 F.2d 1290, 1293 (5th Cir. 1987) (quoting *Seven Elves*, 635 F.2d at 402)[2]

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2. Inwood contends that an abuse of discretion exists if the district court's decision is based on a clearly erroneous factual (Cont'd)

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B. Analysis

Rule 60(b) motions may not be used to obtain relief beyond setting aside the final judgment. *See generally*, 12 James W. Moore et al., *Moore's Federal Practice*, § 60.25 (3rd ed. 1999). In other words "[t]he denial of a Rule 60(b) motion does not bring up the underlying judgment for review." *Ta Chi Navigation*, 728 F.2d at 703. Inwood's September 17, 1999 motion: (1) requested that the district court vacate its dismissal order; (2) requested that the court vacate its patent claim construction; and, (3) requested judgment as a matter of law that Wal-Mart infringes the patent in suit. Clearly, Inwood's arguments relating to the dismissal of its claims and the merits of the patent issues are not relevant to our review of the district court's denial of Inwood's 60(b) motion, as they are requests for relief beyond setting aside the final judgment. *Id.*; *see also* Order, slip op. at 2. Consequently, we will only address Inwood's arguments that pertain to the district court's alleged abuse of discretion in denying Inwood's request to vacate the dismissal order.

(Cont'd)
finding, an erroneous conclusion of law, or the record contains no evidence on which the lower court could have rationally based its decision, or the court's decision is clearly unreasonable, arbitrary or fanciful. In view of *Hill*, *Fackelman*, and *Godwin*, however, this contention is clearly incorrect. To find that a denial of a Rule 60(b) motion was an abuse of discretion, it is not necessarily enough that the judgment obviously conflicts with a clear statutory mandate or that the judgment involves a fundamental misconception of the law, as that would merely mean that granting of relief would have been permissible. Rather, denial must have been so unwarranted as to constitute an abuse of discretion, and the petitioner must not have forfeited a proper appeal on the merits.

Appendix A

First, Inwood contends that the evidence does not support the court's factual finding that the parties had reached an enforceable settlement agreement upon which the case should be dismissed. In support of this contention, Inwood asserts that the parties never came to a meeting of the minds as to what the Settlement Agreement covered. Inwood contends that there were communications from both sides after March 19, 1999 regarding changes to the agreement, which indicate that all of the terms of the agreement were not settled. Moreover, the content of those communications evidence that the sides were at polar opposites with respect to certain provisions of the agreement.

In further support of its contention that no enforceable settlement agreement had been reached, Inwood asserts that neither Wal-Mart Stores, Inc. nor George Broussard, one of the owners of Apogee, signed the Settlement Agreement. Instead, only an associate attorney of the law firm whose partners represent these two parties signed for them. Inwood contends that the failure of the two clients to sign the March 19, 1999 document themselves renders it an unenforceable agreement.

The foregoing arguments do not evince that the district court had a fundamental misconception of the law as to contract formation regarding the Settlement Agreement. As to the issue of execution of the agreement by Wal-Mart Stores, Inc.'s counsel on behalf of it and Broussard, we note that to prevail on a Rule 60(b) motion premised on the court's allegedly mistaken belief that counsel had settlement authority, the movant must establish that the attorney acted without any kind of authority. *See Infante v. Bridgestone/*

Firestone, Inc., 6 F.Supp.2d 608, 610 (E.D. Tex. 1998); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 124 (Tex. App. 1994). However, a party's counsel is presumed to have settlement authority when counsel is present at a mediation session intended to settle a lawsuit. *See Walden v. Sanger*, 250 S.W.2d 312, 316 (Tex. Civ. App. 1952); *Applewhite v. Sessions*, 131 S.W.2d 301, 304 (Tex. Civ. App. 1939). To overcome this presumption, Inwood would have had to provide affirmative proof that the attorney had no right to consent to a settlement. *See Williams v. Nolan*, 58 Tex. 708 (1883), available at 1883 WL 9093, at *5; *Walden*, 250 S.W.2d at 316.

The purpose of the March 19 mediation session was to settle the infringement suit. Moreover, the Settlement Agreement specifically indicates that the person who signed for Wal-Mart Stores, Inc. was "counsel for" them. In addition, the Settlement Agreement specifically includes that associate's indication that he was also signing the document "as counsel for . . . Broussard." Furthermore, the district court noted that Inwood has not provided affirmative proof that the associate had no right to consent to the settlement agreement. In view of the foregoing circumstances and the presumption, we conclude that Inwood's argument as to the execution of the agreement lacks merit.

Furthermore, the district court considered and rejected Inwood's arguments regarding the meeting of the minds of the parties in the July 9, 1999 hearing. In particular, the court noted that notwithstanding the fact that Inwood disagreed with the Markman claim interpretation going into the

mediation, the signed agreement[3] contains essential terms so as to be enforceable. Moreover, the district court noted that the Settlement Agreement is unambiguous, and it sets forth the terms on which the parties would settle. In addition, the court pointed out that none of the post-mediation offers and counteroffers for changes to the Settlement Agreement were accepted by the parties; and, thus, it was proper to enforce the original document produced at the mediation.[4]

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3. Inwood contends that the Settlement Agreement is a draft document and in view of *Wang Lab., Inc. v. Applied Computer Sci., Inc.*, 958 F.2d 355, 359, 22 USPQ2d 1055, 1059 (Fed. Cir. 1992), it is unenforceable. However, we disagree that *Wang* dictates that the instant Settlement Agreement is an unenforceable draft because, unlike in *Wang*, the Settlement Agreement was signed by the parties. Moreover, the document contains no other indicia that it is a draft.

4. Inwood asserts, in the alternative, that the post-mediation correspondence between the parties constitutes a repudiation or anticipatory breach of the Settlement Agreement. However, an anticipatory breach occurs only when a party makes a clear and unequivocal statement of his intention to break the contract when his performance comes due — a statement "sufficiently positive to be reasonably understood as meaning that the breach will actually occur." 2 E. Allan Farnsworth, Farnsworth on Contracts § 8.21, p. 475 (1990); *see also Mobley v. New York Life Ins. Co.*, 295 U.S. 632, 638 (1935) (noting that repudiation by one party, to be sufficient to entitle the other to treat the contract as absolutely and finally broken, must at east amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation). In view of the foregoing, we note that there can be no breach of the Settlement Agreement where the post-mediation offers or counteroffers regarding the mutual releases and formal documents did not manifest either parties' intent to breach the dismissal of the claims of the infringement suit, i.e., to substantially perform under the contract. Therefore, this argument also does not support a finding of an abuse of discretion.

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Our review of the terms of the Settlement Agreement supports the district court's determination that the agreement, as a contract, contained unambiguous terms and is binding on the parties. Thus, none of Inwood's arguments regarding the lack of a meeting of the minds convince us that the district court made an error of law. Therefore, none of Inwood's arguments in this regard provide evidence to support an abuse of discretion by the district court in dismissing the Rule 60(b) motion.

Inwood also contends that because there was never a meeting of the minds as to the Settlement Agreement, in that "not all parties" signed it, and it lacked consideration, the agreement was invalid. Thus, Inwood asserts that the district court erred as a matter of law in enforcing the Settlement Agreement against it. As we noted above, Inwood's contention that not all of the parties signed the agreement is without merit. As for the contention regarding lack of consideration, the district court considered and rejected that argument in the July 9, 1999 hearing. The district court recognized that contract formation requires consideration, noting specifically that consideration is implied in a written contract. Moreover, the district court indicated that the party seeking to demonstrate a lack of consideration bears the burden of proof, which burden it found Inwood had not carried.

We agree that in the Fifth Circuit there is a presumption of sufficient consideration to support a written agreement that is signed by the parties sought to be charged. *See Tag Res., Inc. v. Petroleum Well Serv., Inc.*, 791 S.W.2d 600, 605-606 (Tex. App. 1990); *Cortez v. Nat'l. Bank of*

Commerce, 578 S.W.2d 476, 479 (Tex. App. 1979); 14 Tex. Jur. 3d Contracts, sec. 104 (1988 Supp.). Moreover, we agree that in the Fifth Circuit, a party who wishes to contest the existence of consideration for a written contract has the burden of proving a lack of consideration. *See* Tex. R. Civ. P. 93(9). Furthermore, in the Fifth Circuit surrendering a legal right represents valid consideration. *N. Natural Gas Co., v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998). In this regard, as Wal-Mart points out, its claims for costs and attorney's fees were extinguished as a term of the Settlement Agreement. Thus, we cannot say that the district court fundamentally misconceived the law regarding consideration. Consequently, this argument by Inwood does not support a finding of an abuse of discretion.

Lastly, Inwood asserts that it was unreasonable for the district court to require that the mutual release include the obligation to release the parties and their attorneys. This last contention was not raised by Inwood before the district court. It is within our discretion to resolve issues raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule.") Because this is not a purely legal issue in which the record pertinent to resolution of the issue has been fully developed, we exercise our discretion not to address it. *See Jay v. Sec'y of Health and Human Servs.*, 998 F.2d 979, 983 n.4 (Fed. Cir. 1993) (declining to consider a complex legal issue not raised); *Cemex, S.A. v. United States*, 133 F.3d 897, 904 (1998) (declining to address an argument raised for the first time on appeal that involved resolution of factual issues).

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In addition to the foregoing, we note all of Inwood's arguments are ones that could have been made on a timely appeal of the final judgment. Inwood, however, failed to do this. We conclude that Inwood is attempting to improperly end-run the normal appellate process for correcting legal error through its Rule 60(b) motion. *See Fackelman*, 564 F.2d at 736; *Alvestad*, 671 F.2d at 913. Under the foregoing circumstances, Rule 60(b) cannot be considered an appropriate avenue of relief for Inwood.

CONCLUSION

Allowing Inwood to invoke Rule 60(b) would allow it to challenge alleged mistakes of law that should have been raised on a direct appeal of the judgment. It would also permit the circumvention of the time restrictions for an appeal, and thus, would undermine the concepts of orderly procedure and desirable finality in judgments. For the reasons discussed above, we discern no abuse of discretion in the district court's denial of Inwood's September 17, 1999 motion, which we have deemed to be a Rule 60(b) motion. Thus, we affirm the district court's judgment denying that motion.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-1024

INWOOD INTERNATIONAL CO.,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC., APOGEE SOFTWARE, LTD., SCOTT MILLER, and GEORGE BROUSSARD,

Defendants-Appellees.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Texas

in CASE NO(S) No. 3:98-CV-1846-D, No. 00-1024

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: *AFFIRM*

ENTERED BY ORDER OF
THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED: November 17, 2000

ISSUED AS A MANDATE: DECEMBER 20, 2000

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING MOTION TO DISMISS APPEAL DATED AND FILED NOVEMBER 8, 1999

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1024

INWOOD INTERNATIONAL COMPANY,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC., APOGEE SOFTWARE, LTD., SCOTT MILLER, and GEORGE BROUSSARD,

Defendants-Appellees.

ON MOTION

Before GAJARSA, *Circuit Judge*.

ORDER

Wal-Mart Stores, Inc. et al. move to dismiss Inwood International Company's appeal as untimely. Inwood opposes. Wal-Mart Stores et al. reply.

On August 27, 1999, the United States District Court for the Northern District of Texas entered judgment dismissing Inwood's claims against Wal-Mart et al. On

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September 17, 1999, Inwood filed a motion to vacate the district court's dismissal order. The district court denied Inwood's motion on September 20, 1999. Inwood filed its notice of appeal on October 5, 1999.

Wal-Mart argues that Inwood's appeal should be dismissed for lack of jurisdiction because Inwood failed to file its notice of appeal within 30 days of the district court's August 27, 1999 order and that Inwood's September 17, 1999 motion, filed more than 10 days after the entry of judgment, did not toll the time for filing the appeal. *See* Fed. R. Civ. P. 59(e) and Fed. R. App. P. 4(a)(4)(A). Inwood responds that the August 27, 1999 order was not a final judgment and that its motion to vacate was therefore not a post-judgment motion subject to the 10-day filing period. Rather, Inwood argues that the district court's denial of Inwood's motion to vacate is the final judgment and that Inwood's appeal, filed within 30 days of the denial, is timely. Inwood also argues that his appeal of the denial of the motion to vacate encompasses the underlying patent issues in the case.

The district court's August 27, 1999 order was a final decision as it dismissed all claims pending against Wal-Mart et al. and left nothing for the district court to do but execute the judgment. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). Inwood's argument that the August 27, 1999 order was not final because it was deficient is not on point. The district court dismissed all claims and intended to do nothing further. The Federal Rules of Civil Procedure provide the mechanism for making such an argument, i.e., to file a

timely Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. Inwood did not do so and, thus, may not seek review in this appeal of the merits of the dismissal order or the underlying patent issues.

At best, Inwood's avenue for maintaining an appeal in this court is for the court to treat Inwood's motion to vacate as a Fed. R. Civ. P. 60(b) motion. *See* 12 James Wm. Moore et al., Moore's Federal Practice § 60.03[4] (3d ed. 1998) (motion filed more than 10 days after a final judgment is a Rule 60(b) motion); *see also Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (treating untimely Rule 59(e) motion as Rule 60(b) motion). The denial of a Rule 60(b) motion is a final and appealable order. *Id.* § 60.68[1]. Here, Inwood filed its notice of appeal on October 5, 1999, within 30 days of the district court's September 20, 1999 denial of Inwood's Rule 60(b) motion. Thus, Inwood's appeal to the extent it seeks review of the denial of a Rule 60(b) motion is timely.

However, the appeal of the denial of a Rule 60(b) motion is narrow in scope and encompasses only the propriety of the trial court's denial of that motion. The appeal does not reach the merits of the underlying judgment from which relief was sought. 12 James Wm. Moore et al., Moore's Federal Practice § 60.68[3] (3d ed. 1998). Thus, the instant appeal does not encompass the district court's dismissal of Inwood's claims or the merits of the patent issues, but encompasses only whether the district court abused its discretion in denying Inwood's Rule 60(b) motion.

Appendix B

Accordingly,

IT IS ORDERED THAT:

Wal-Mart et al.'s motion to dismiss is denied. However, Inwood's appeal is limited to whether the district court abused its discretion in denying Inwood's Rule 60(b) motion.

NOV – 8 1999
Date

s/ Arthur J. Gajarsa
Arthur J. Gajarsa
Circuit Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DENYING MOTION TO VACATE ORDER OF DISMISSAL DATED AND FILED SEPTEMBER 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:98-CV-1846-D

INWOOD INTERNATIONAL CO.,

Plaintiff,

vs.

WAL-MART STORES, INC., et al.,

Defendants.

ORDER

Plaintiff's September 17, 1999 motion to vacate and set aside the order of dismissal entered August 27, 1999, to vacate and set aside the *Markman* report and recommendation of the special master, and for judgment as a matter of law in favor of plaintiff is denied.

SO ORDERED.

September 17, 1999.

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED AUGUST 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:98-CV-1846-D

INWOOD INTERNATIONAL CO.

Plaintiff,

vs.

WAL-MART STORES, INC., APOGEE SOFTWARE LTD., SCOTT MILLER, and GEORGE BROUSSARD

Defendants.

ORDER OF DISMISSAL

On July 9, 1999, the Court conducted an evidentiary hearing on defendants' April 30, 1999 motion for entry of settlement agreement and dismissal. For the reasons set out in the Court's bench ruling, the Court grants the motion and enters the following order.

It is hereby ORDERED that:

1. All claims asserted by Plaintiff Inwood International Company against Defendants Apogee Software Limited, Scott Miller and George Broussard in this action are dismissed with prejudice;

Appendix D

2. All claims asserted in this action by Plaintiff Inwood International Company against Defendant Wal-Mart Stores, Inc. which relate to Apogee Software Limited's games are dismissed with prejudice;

3. All claims asserted in this action by Plaintiff Inwood International Company against Defendant Wal-Mart Stores, Inc. which do not relate to Apogee Software Limited's games are dismissed without prejudice;

4. Each party shall to bear its own costs, expenses, and attorneys' fees; and

5. All relief not expressly granted herein is expressly denied.

SIGNED this 26th day of August, 1999.

s/ Sidney A. Fitzwater
UNITED STATES DISTRICT JUDGE

AGREED as to form, reserving
all rights including any further
motions and appeal:

s/ [illegible – not Ernest Kettelson's signature]
Ernest Kettelson
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Wynderidge Place
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Appendix D

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ATTORNEYS FOR PLAINTIFF

AGREED AS TO FORM:

s/ J. Pat Heptig
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APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION REFUSING TO RULE ON MERITS OF SUMMARY JUDGMENT PROCEEDINGS DATED AND FILED AUGUST 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:98-CV-1846-D

INWOOD INTERNATIONAL CO.,

Plaintiff,

vs.

WAL-MART STORES, INC., et al.,

Defendants.

ORDER

In this action transferred to this court from the Northern District of Illinois, the following motions were filed prior to transfer of the case: the May 19, 1998 motion for partial summary judgment of defendants Apogee Software, Ltd. ("Apogee") and Wal-Mart Stores, Inc. ("Wal-Mart"); the July 17, 1998 motion to dismiss count IV of defendants Apogee, Wal-Mart, Scott Miller, and George Broussard; and the July 29, 1998 motion of plaintiff Inwood International Company ("Inwood") for leave to file supplemental brief in response to defendants' reply memorandum.

Appendix E

The court denies defendants' July 17, 1998 motion to dismiss count IV. Under the highly deferential standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and viewing the allegations of Inwood's complaint in the light most favorable to Inwood for purposes of deciding the motion to dismiss, *see, e.g., Royal Bank of Canada v. FDIC*, 733 F. Supp. 1091, 1094 (N.D. Tex. 1990) (Fitzwater, J.), the court is unable to say beyond doubt that Inwood can establish no set of facts in support of count IV that would entitle it to relief.

The court also denies defendants' May 19, 1998 motion for partial summary judgment. In turn, this renders moot Inwood's July 29, 1998 motion for leave to file supplemental brief. Defendants filed their motion for partial summary judgment under the local rules that control in the Northern District of Illinois. The rules of this court, *see* N.D. Tex. R. 56.1-56.7, are very specific concerning the requirements for summary judgment motions. The papers submitted to the Northern District of Illinois court do not comply with this court's rules. The court desires to consider motions filed in accordance with its own rules. Of particular significance to defendants is Rule 56.2(b), which provides that "Unless otherwise directed by the presiding judge, or permitted by the Federal Rules of Civil Procedure, a party may file *no more than one* motion for summary judgment" (emphasis added). Because the court intends to apply this rule to this case, if it addresses the May 19, 1998 motion, defendants will already have used up their one motion. In fairness to them, they should be given the opportunity to reconsider whether their single motion should be the one submitted to the Northern District of Illinois court.

Appendix E

The motions are denied.

SO ORDERED.

August 31, 1998.

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX F — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION TRANSFERRING CASE TO TEXAS ON ITS OWN MOTION DATED JULY 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 97 C 5904

INWOOD INTERNATIONAL CO.,
an Illinois corporation,

Plaintiff,

vs.

WAL-MART STORES, INC., et al.,

Defendant.

Chicago, Illinois
July 7, 1998
9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO

* * *

Appendix F

[2] (Proceedings heard in open court:)

THE CLERK: 97 C 5904, Inwood International versus Wal-Mart, et al.

MR. LYERLA: Good morning, Your Honor, Brad Lyerla on behalf of the defendants.

MR. KETTELSON: Good morning, Your Honor, I'm Mr. Kettelson for the plaintiff, and my co-counsel is Mr. Naughton from the Brinks, Hofer firm.

MR. LYERLA: This is Mr. Selinger, who I should have introduced as we stepped up, but he was dawdling behind and just arrived.

THE COURT: Well, this is a case that I think needs some judicial attention, and it's been reassigned to me pursuant to my having to disqualify myself on some other piece of litigation that went to Judge Manning, just so you know the history to this. And, therefore, she's entitled to send a case to me, and she's decided to send this case and so I accept it.

And I will tell you, I appreciate you preparing the status report. I have taken a look at it. I've also taken a look at some of the motions that are pending in this case.

Let me just give you some first impressions. Whenever I look at a case, any new complaint or reassigned matter, the first thing I look to are two things: Jurisdiction and venue, those are the two things that I look at. And I will tell you,

I have a serious issue as to jurisdiction in this case, and [3] that is, as I understand it, the individual defendants have filed a motion to dismiss that's fully briefed based on lack of personal jurisdiction in this district, and that is one of the motions that is pending.

When I look at this case, I look at why is it filed here, and I think the answers that I've come up with are other than plaintiff's counsel being here, which is never to me a controlling factor, what we have is the plaintiff being present. We have Wal-Mart present in any district in this country, and we have some individual defendants that it seems to me that the plaintiff really wants to keep in this case that may not be appropriately sued in this district.

So I'd like to get some reaction to my thoughts.

MR. KETTELSON: Well, I think that in the brief that we filed in response to their motion to dismiss the two individuals, there were cases that would support their jurisdiction before this Court.

I also think that the motion that we filed for a protective order because of some of the conduct of the two individual defendants may in itself be something that brings them within the jurisdiction of this Court.

THE COURT: You're not saying that that conduct itself was initiated in this district.

MR. KETTELSON: Well, I'm in this district, and that's where the — I was the target of all of the unwanted e-mail,

to [4] use a very polite term. And that, frankly, is enough to really discourage an attorney from even getting involved in handling a case of this kind. It really disturbed me, especially when it was followed up by telephone calls at night that were obscene and things of that nature.

Now, I don't want to make too big a thing of that. I do think that a protective order would be justified, but I think that the cases that I cited in the brief in response to their motion to dismiss Mr. Broussard and Mr. Miller do give the Court a legitimate basis on which to find that there is jurisdiction here.

It is, after all, a patent infringement matter, and the individual defendants, even though they say they are operating under a limited partnership, some of the documents that I have submitted in response to their motion for partial summary judgment relating to information that I found out subsequently, this Texas limited partnership has a corporate general partner of which both of the individuals, Mr. Miller and Mr. Broussard, are the principal officers and may be the only parties.

And we did find in our investigation that that corporate general partner had actually been dissolved for a period of some 13 months just recently, in which case Mr. Broussard and Mr. Miller would be the — acting as individuals, not within the corporate shield as general [5] partners of that corporation.

So I think that there is — that Mr. Miller and Mr. Broussard are the principals as individuals in committing the infringement of the patent in this case.

Furthermore, that limited partnership was only formed, I believe, in 1994, and prior to that time, Mr. Miller had been conducting the business under an assumed name of Apogee as an individual sole proprietor, making the same types of video games. That, in our opinion and as we allege, infringed the patent. And patent infringement is itself a basis on which to find jurisdiction in this particular jurisdiction.

THE COURT: Okay, let me get the defendants' perspective.

MR. SELINGER: If I may respond, Your Honor. Let me first address the issue of the protective order because serious accusations were made against the individuals in there.

THE COURT: Okay.

MR. SELINGER: Very simply, Mr. Miller and Mr. Broussard have categorically denied under oath that they made any of the statements that were actually asserted or have done anything improper, and I think it's important to recognize that in the motion for protective order, serious accusations were made by the plaintiff, but the supporting declaration for that was very, very watered down, very, very mild, and there was a huge disparity between the accusations that were made in [6] a pleading and what was actually sworn to by the same person. One as a declarant, or affiant, and one as counsel.

Be that as it may, Mr. Broussard and Mr. Miller each filed a declaration denying that they had made any of the

accusations or done anything improper. It's been briefed, I won't belabor it, but I want to make it clear to the Court that the individuals have not done anything wrong. They've denied it, and there's no evidence that they have.

As far as the jurisdictional issue is concerned, I obviously agree with the Court. They are — Mr. Miller and Mr. Broussard are limited partners in a Texas limited partnership. There's a corporate general partner, and under Texas law, they are limited partners only.

Mr. Kettelson is partially correct about what happened in effect to the corporate general partner. What he didn't discuss is the Texas law. The corporation continued. The principals didn't become somehow individually liable, somehow individual general partners.

That's not something that was raised by Mr. Kettelson in his opposition to our jurisdictional motion. It was raised as part of his opposition to our pending dispositive motion for summary judgment. We haven't — our reply was technically scheduled for last week. Mr. Kettelson was kind enough to join in or agree with me to a motion to extend my due date for a week.

[7] We'll deal with the Texas corporate and limited partnership issues in a footnote there because that's, I think, all they deserve; but the bottom line is the two individuals have no contact with this jurisdiction, and I think the motion is ripe for their dismissal.

MR. KETTELSON: May I add another comment, Your Honor?

THE COURT: Sure.

MR. KETTELSON: On that motion for a protective order, Mr. Selinger says that Mr. Broussard and Mr. Miller didn't do anything wrong. Not to make too much of a point of it, the harassing telephone calls and the objectionable e-mail stopped immediately as soon as I filed the motion for protective order.

Mr. Miller was responsible for putting on the web site of Apogee notice of this lawsuit and calling it, I forget exactly what derogatory term was actually used, and then asking people to protest it. That certainly is an invitation for people that he knew would respond by sending unwanted, obscene types of e-mail that overburdened our computer system and we were unable to use it for a while.

That really was a very annoying thing, and to say that they had nothing to do with it is not completely accurate, even though they did not send any of the e-mail messages themselves that were objectionable. And I don't know whether they made any telephone calls or not. I have no way of knowing that.

THE COURT: Okay. Let me just say, and I don't even [8] know where to begin because every time you take over a piece of litigation from another judge, you always have to begin somewhere. So I'm going to begin with, first of all, the plaintiff has filed a motion for leave to file a first amended complaint. Using my discretion pursuant to Rule 15, I'm going to grant that motion.

No. 2, the individual defendants, I believe, have filed a motion — or actually it's defendants Apogee Software and Wal-Mart to dismiss Count 4, part of that being because of jurisdictional issues, part of it also being because of failure to plead a valid cause of action. I'm going to deny that motion. I do so without prejudice to its future renewal, but in view of the amended complaint, I believe it is appropriate to deny it without prejudice.

Now we come to the motion for a protective order. The protective order we've really spent the most time with today. You're most anxious to get a ruling from the Court. I understand that no further action is out there at this point.

I am troubled by the fact that the defendants did circulate certain information that contained plaintiff's counsel's e-mail address and his telephone and fax numbers and all but made it very easy for other individuals unknown to this Court to inundate plaintiff's counsel with their strong views on the merits of this lawsuit.

For that reason, I'm going to grant the motion for a [9] protective order to a limited extent. I will grant it to this limited extent, and I do so to a limited extent because I believe every litigant still has First Amendment rights to their viewpoints on litigation.

But I grant it to the limited extent of entering an order indicating that defendants should not place any further correspondence in computers that discloses plaintiff's counsel's business telephone number, fax number or e-mail

address. That I consider to be inappropriate and crossing the line and basically requesting in so many ways contact, improper contact, with plaintiff's counsel.

So I want to make sure that that does not occur again. Now, that doesn't prohibit the defendants from saying whatever they want about the merits of this case. That is the right of every American, but they cannot couple it with giving all of this other underlying information that makes it easy for people to comment directly to plaintiff's counsel. That's what I consider to be inappropriate.

Then we get to the final motion that I think is fully briefed, which is this motion to dismiss for lack of jurisdiction. I believe in patent law cases, just like in any other case, this Court still has to ensure itself that venue and jurisdiction are appropriate in this district and make sure that all of the requirements under both the U.S. Constitution and in this case borrowing from the Illinois Constitution have [10] been met in order to obtain jurisdiction over the personal defendants that have been sued in this case.

I cannot conclude that jurisdiction is established in this district and under Illinois, given the contacts that Mr. Miller and Mr. Broussard have had in this jurisdiction. There's certainly no indication that they have consciously availed themselves of Illinois for purposes of doing business. Certainly in a general way, they have done business with Wal-Mart, but that is no different than as occurs in the other states except for one, and that is the state of Texas.

Now, my recollection, in plowing through these pleadings, was it Jasper is where they're located? Where was it?

MR. SELINGER: It's outside of Dallas, Your Honor.

THE COURT: It's outside of Dallas.

MR. SELINGER: Yes.

THE COURT: Okay, other than granting the motion to dismiss, instead I'm going to use my discretion under 28 U.S.C. 1406 and transfer this lawsuit to the Northern District of Texas where I think it belongs and where it should be litigated and where your motion for partial summary judgment will be adjudicated.

That having been said, I'll certainly — and I will tell you this — grant your agreed motion to extend the time for this last brief, and I'll extend it even beyond a week. I [11] think it's going to take at least three weeks to get this case down to Dallas.

Now, having done all of that, I will tell you, it gives me no pleasure to give work and to send you all to a third judge who's going to have to plow through at least some of these pleadings. What are you doing on the settlement front at all? Have you exhausted that?

MR. KETTELSON: We're so far apart, Your Honor. We have talked about it a little bit, but certainly willing to discuss it further, but —

THE COURT: Well, I will tell you, if you're mutually agreeable, I would be happy to spend some time with you before this month is out to try and settle this case. You could avail yourselves of the free services of a federal judge, because I don't think this case will get down there, it's my experience it takes at least three weeks to four weeks to get down to the Northern District of Texas.

But I need a phone call from both of you saying you want to avail yourselves of my services. If I get such a call, I'll be happy to sit down with you, and I've done that in other cases and have settled them because at that point, you're dealing with somebody who's totally objective, who has no interest in the litigation other than to save a colleague in another district from having to use their judicial resources, and in this case in particular, saving a second judge or a [12] third judge from looking at this, even though I've only become a way station here.

So think about that, and if you get to the point that you want to avail yourselves of my services, just call up Ms. O'Shea.

MR. KETTELSON: There's one other housekeeping matter that I was going to bring up, but since you're transferring the case, I was going to submit an oral motion to submit the original deposition of Scott Miller, and I've talked to the defendants' counsel, and they have no objection to it, but —

THE COURT: I would say hold off on that motion until you get down to the Northern District.

MR. KETTELSON: That would be all right.

THE COURT: Thank you.

MR. LYERLA: Thank you, Your Honor.

MR. KETTELSON: Thank you.

(Which were all the proceedings heard.)

* * * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 13, 2000

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-1024

INWOOD INTERNATIONAL COMPANY,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC., APOGEE SOFTWARE, LTD., SCOTT MILLER and GEORGE BROUSSARD,

Defendants-Appellees.

ORDER

Before RADER, Circuit Judge, SCHALL, Circuit Judge, and LINN, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

Appendix G

The mandate of the court will issue on December 20, 2000.

FOR THE COURT,

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: December 13, 2000

APPENDIX H — RELEVANT STATUTES

28 U.S.C. § 53(e)(5)

Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

* * *

28 U.S.C. § 54

(a) Definitions; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of the proceedings, the report of a master, or the record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express direction that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

* * *

Appendix H

28 U.S.C. § 58

Entry of Judgment. Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special or general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

* * *

28 U.S.C. § 59(b) and (e)

New Trials; Amendment of Judgments.

* * *

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

* * *

28 U.S.C. § 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a

defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * *

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

28 U.S.C. § 1291

Final decisions of district courts. The courts of appeals (other than the United States Court Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court

of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

* * *

28 U.S.C. § 2201

Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

* * *

Appendix H

35 U.S.C. § 271

Infringement of patent.

(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

* * *

35 U.S.C. § 281

Remedy for infringement of patent. A patentee shall have remedy by civil action for infringement of his patent.

* * *

Appendix H

35 U.S.C. § 284

Damages. Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

* * *

35 U.S.C. § 285

Attorney fees. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

* * * *